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7 MARK S. LAGRONE,  
8 Petitioner,  
9 v.  
10 PATRICK COVELLO,  
11 Respondent.

Case No. [22-cv-03249-JST](#)

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**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS;  
DENYING CERTIFICATE OF  
APPEALABILITY**

19 Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to  
20 28 U.S.C. § 2254 by petitioner Mark LaGrone, challenging the validity of his state court  
21 conviction. ECF No. 1. Respondent has filed an answer to the petition. ECF No. 10 (“Answer”).  
Petitioner has filed a traverse. ECF No. 13. For the reasons set forth below, the Court DENIES  
22 the petition for a writ of habeas corpus and DENIES a certificate of appealability.

**I. PROCEDURAL HISTORY**

23 On February 26, 2020, an Alameda County jury found Petitioner guilty of two counts of  
assault with a deadly weapon, along with an enhancement for personal infliction of great bodily  
injury. The jury also found Petitioner not guilty of two counts of attempted murder. Answer, Ex.  
24 1 (“CT”) at 408, 474-79. On February 27, 2020, the trial court found that Petitioner had sustained  
two prior strike convictions. Answer, Ex. 2 (“RT”) at 879-880. On August 28, 2020, the trial  
court sentenced Petitioner to 19 years in prison. CT 512.

25 On October 20, 2021, the California Court of Appeal affirmed the judgment of conviction  
and corrected the sentence to seventeen years.<sup>1</sup> *People v. LaGrone*, C No. A160959, 2021 WL

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28 <sup>1</sup> The state appellate court agreed with the parties that the trial court had erred in calculating the  
great bodily injury enhancement applicable to Petitioner’s sentence for count four, his subordinate

1 4891295 (Cal. Ct. App. Oct. 20, 2021).

2 On January 6, 2022, the California Supreme Court denied the petition for review in a  
3 summary denial. Answer, Exs. 7, 8.

4 On June 3, 2022, Petitioner filed the instant federal habeas petition. ECF No. 1.

## 5 II. FACTUAL BACKGROUND

6 The following background is taken from the California Court of Appeal's opinion:<sup>2</sup>

### 7 A.

8 The trouble started when two teenagers, S. and T., got into a fight at school. [FN 1]  
9 S.'s mother, Shay, was like a sister to LaGrone. LaGrone met Shay and S. at a park  
10 after he learned that S. had been in a fight and Shay was upset. Shay had a plan to  
go to T.'s home. On the way to T.'s, LaGrone observed S. remove her sweatshirt,  
which he took to mean she was prepared to fight.

11 FN 1: To protect their privacy, this opinion uses either a first name or first  
12 initial to refer to bystanders, witnesses, and victims. (See Cal. Rules of  
Court, rule 8.90.)

13 S., Shay, and LaGrone arrived at T.'s family's apartment in a group of six to eight  
14 people, one of whom was a 16-year-old named Freddy. S. banged on the door to  
the apartment and slammed the security gate; Shay threw a bottle at the apartment.  
They demanded that T. come out for "round two."

15 Eventually, two individuals – a teenager named D.J. and an adult named Jermell –  
16 emerged from the apartment. D.J., who was about 5'6" tall and 130 pounds, began  
17 to fight Freddy, who was about 6'3" tall and 300 pounds. Jermell stood to the side,  
but took on a fighting stance. LaGrone, who also stood to the side, said that they  
should keep the fight fair. LaGrone subsequently took his pocketknife – which he  
carried for his work – off his belt and held it in his hand. Another adult, Wayne,  
18 exited the apartment and watched the fight from the side. Neither D.J., Jermell, nor  
Wayne had any weapons.

20 While he was fighting Freddy, D.J. stumbled or fell. As Freddy approached D.J.,  
21 Jermell hit Freddy hard on the back of his head or neck. Seeing this, LaGrone  
stabbed Jermell in the face. Wayne then punched LaGrone.

22 Jermell realized that LaGrone had a knife after LaGrone stabbed him. Jermell  
23 grabbed LaGrone and put him in a headlock. Wayne continued punching LaGrone  
in the head. While this was happening, LaGrone stabbed Jermell in the side and  
back several times and stabbed Wayne in the stomach and arm. Jermell yelled,  
24 "'He['s] stabbing me.'" After Jermell let go of LaGrone and ran into the house,

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26 term for assault with a deadly weapon, and modified the judgment to reduce the enhancement for  
great bodily injury on that count from three years to one year. *LaGrone*, 2021 WL 4891295, at \*8.

27 <sup>2</sup> The Court has independently reviewed the record as required by AEDPA. *Nasby v. Daniel*, 853  
F.3d 1049, 1052–54 (9th Cir. 2017). Based on the Court's independent review, the Court finds  
28 that it can reasonably conclude that the state court's summary of the prosecution case and the  
defense case is supported by the record, unless otherwise indicated in this order.

1 LaGrone fled.

2 Jermell called 911, then collapsed and was taken to the hospital with nine or ten  
3 stab wounds to his stomach and back. Doctors performed surgery and installed a  
tube to drain blood from his lungs. Wayne had a minor wound to his bicep and a  
gash on his stomach that required surgery to repair an intestine.

4 The altercation was captured on cell phone and surveillance cameras.

5 **B.**

6 The prosecutor charged LaGrone with two counts of attempted murder (Pen. Code,  
7 §§ 187, subd. (a), 664; counts one and two) and two counts of assault with a deadly  
8 weapon (Pen. Code, § 245, subd. (a)(1); counts three and four). [FN 2] The  
information alleged that LaGrone personally inflicted great bodily injury (§  
12022.7, subd. (a)) with respect to each count.

9 FN 2: Undesignated statutory references are to the Penal Code.

10 At trial, LaGrone asserted that his initial assault of Jermell was legally justified  
11 because he was acting in defense of Freddy. Further, his subsequent assaults on  
Jermell and Wayne were legally justified because he was acting in self-defense.

12 A defendant may have a complete defense based on self-defense or defense of  
13 another if the defendant “actually and reasonably believe[d] in the necessity of  
defending [him or her]self [or another person] from imminent danger of death or  
14 great bodily injury.” (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on  
another ground by *People v. Chun* (2009) 45 Cal.4th 1172, 1201; see also  
15 CALCRIM No. 3470.) These defenses require that “[t]he defendant used no more  
force than was reasonably necessary to defend against [the] danger.” (CALCRIM  
16 No. 3470; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 966 (*Pinholster*),  
disapproved of on another ground by *People v. Williams* (2010) 49 Cal.4th 405,  
17 459.)

18 According to LaGrone’s trial testimony, he did not intend to fight anyone that day  
and only had a knife with him because he wore it on his belt for work. He got  
involved in the fight because Freddy was just a kid and he was worried for his  
19 safety after Jermell, a grown man, started assaulting him. LaGrone was fearful  
because Jermell appeared younger and bigger than he was. When he was in the  
headlock, LaGrone panicked and started swinging his knife wildly.

21 **C.**

22 The jury found LaGrone not guilty of the attempted murder counts. The jury found  
23 him guilty of the two counts of assault with a deadly weapon, and found true the  
allegation that he had inflicted great bodily injury in connection with both counts.  
The court sentenced LaGrone to an aggregate term of 19 years in prison.

24 *LaGrone*, 2021 WL 4891295, at \*1-\*2.

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### III. DISCUSSION

#### A. Standard of Review

A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state courts’ adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Additionally, habeas relief is warranted only if the constitutional error at issue “had substantial and injurious effect or influence in determining the jury’s verdict.” *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

A state court decision is “contrary to” clearly established Supreme Court precedent if it “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.” *Williams*, 529 U.S. at 405–06. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court’s jurisprudence. “[C]learly established Federal law, as determined by the Supreme Court of the

1       United States” refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions  
2       as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. “A federal court  
3       may not overrule a state court for simply holding a view different from its own, when the  
4       precedent from [the Supreme Court] is, at best, ambiguous.” *Mitchell v. Esparza*, 540 U.S. 12, 17  
5       (2003).

6                  The state court decision to which § 2254(d) applies is the “last reasoned decision” of the  
7       state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991);<sup>3</sup> *Barker v. Fleming*, 423 F.3d  
8       1085, 1091–92 (9th Cir. 2005). Because the state supreme court issued a summary denial of the  
9       petition for review, the Court reviews the California Court of Appeal’s October 20, 2021 decision  
10      because it was the last reasoned state court decision to consider Petitioner’s claim.

## 11                  B.     Petitioner’s Instructional Error Claim

### 12                  1.     Legal Standard

13                  Due process requires that “‘criminal defendants be afforded a meaningful opportunity to  
14       present a complete defense.’” *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting  
15       *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Therefore, a criminal defendant is entitled to  
16       adequate instructions on the defense theory of the case. *See Conde v. Henry*, 198 F.3d 734, 739  
17       (9th Cir. 2000) (error to deny defendant’s request for instruction on simple kidnapping where  
18       instruction supported by evidence). A conviction based on a general verdict is subject to challenge  
19       if the jury was instructed on alternative theories of guilt and may have relied on an invalid one.  
20       *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam).

21                  However, a habeas petitioner is not entitled to relief unless the instructional error “‘had  
22       substantial and injurious effect or influence in determining the jury’s verdict.’” *Brecht v.*  
23       *Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776  
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25                  <sup>3</sup> Although *Ylst* was a procedural default case, the “look through” rule announced there has been  
26       extended beyond the context of procedural default. *Barker v. Fleming*, 423 F.3d 1085, 1091 n.3  
27       (9th Cir. 2005). The look through rule continues as the Ninth Circuit held that “it is a common  
28       practice of the federal courts to examine the last reasoned state decision to determine whether a  
state-court decision is ‘contrary to’ or ‘an unreasonable application of’ clearly established federal  
law” and “it [is] unlikely that the Supreme Court intended to disrupt this practice without making  
its intention clear.” *Cannady v. Adams*, 706 F.3d 1148, 1158 (9th Cir.), *amended*, 733 F.3d 794  
(9th Cir. 2013).

(1946)). In other words, state prisoners seeking federal habeas relief may obtain plenary review of constitutional claims of trial error, but are not entitled to habeas relief unless the error resulted in “actual prejudice.” *Id.*; see, e.g., *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (finding *Brecht* error where “at the very least, we ‘cannot say with fair assurance . . . that the judgment was not substantially swayed by the [instructional] error.’”)). The proper question in assessing harm in a habeas case is, ““Do I, the judge, think that the error substantially influenced the jury’s decision?”” *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995). If the court is convinced that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. *Id.* at 437. If, on the other hand, the court is not fairly assured that there was no effect on the verdict, it must reverse. *Id.* In the “narrow circumstance” in which the court is in “grave doubt” about whether the error had substantial and injurious effect or influence in determining the jury’s verdict, it must assume that the error is not harmless and the petitioner must win. *Id.* at 436, 438; see, e.g., *id.* at 436-44 (relief granted because record so evenly balanced that conscientious judge in grave doubt as to harmlessness of error); *Chambers v. McDaniel*, 549 F.3d 1191, 1200-01 (9th Cir. 2008) (granting habeas relief based upon “grave doubt” as to harmlessness of erroneous first-degree murder instruction on premeditation, where error went to “very heart of the case” and evidence against petitioner was not so great that it precluded verdict of second-degree murder).

## 2. Analysis

Petitioner argues that the giving of CALCRIM No. 3742 prevented the jury from giving full, meaningful, and correct consideration to his defense of self-defense/defense of others, thereby resulting in actual prejudice and denying him his right to present a complete defense. Specifically, Petitioner argues that there was “more than substantial” evidence supporting self-defense: (1) he only attacked Jermell and Suber after Jermell attacked a minor; (2) Jermell and Suber struck and punched him in the head and placed him in a headlock; and (3) there was no evidence showing that Petitioner provoked the fight. Petitioner further argues that because CALCRIM No. 3472 instructed the jury that if they believed that Petitioner had contrived to use self-defense, the jury was unable to consider the “more than substantial” evidence of self-defense. *See generally* ECF

1 No. 1.

2 Petitioner presented a similar claim on direct appeal, arguing that trial court erred in  
3 instructing with CALCRIM No. 3472 because the instruction was not supported by the evidence.  
4 The state appellate court did not directly address whether there was sufficient evidence to support  
5 the instruction, but found that, even assuming Petitioner to be correct, the giving of CALCRIM  
6 No. 3742 did not prejudice Petitioner under either state or federal law:

7 *Instruction on Contrived Self-Defense*

8 LaGrone contends that the trial court committed reversible error by instructing the  
9 jury that “[a] person does not have a right to self-defense if he provokes a fight or  
10 quarrel with the intent to create an excuse to use force.” (See CALCRIM No.  
11 3472.) We review this claim of instructional error independently (*People v. Waidla*  
12 (2000) 22 Cal.4th 690, 733 (*Waidla*)), and we find no prejudicial error.

13 LaGrone asserts that there was no evidence that he provoked a fight with the intent  
14 to create an excuse to use force; instead, his testimony suggested that although he  
15 went along with the group, he himself did not take any action to provoke the fight.

16 Assuming LaGrone’s version of events is the only reasonable view of the evidence,  
17 he was not prejudiced under either state or federal law. Where the court provides  
18 the jury with an instruction that is a correct statement of the law but is nonetheless  
19 inapplicable to the facts of the case, the error is harmless because the jury is  
20 presumed to follow the court’s instructions. (See *People v. Eulian* (2016) 247  
21 Cal.App.4th 1324, 1335 [“If CALCRIM No. 3472 was erroneously given because it  
22 was irrelevant under the facts, the error is merely technical and not grounds for  
23 reversal.”]; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 (*Frandsen*)  
24 [“appellant’s assertion that no substantial evidence supported the [giving of  
25 CALCRIM No. 3472] does not warrant our finding reversible error because the  
26 jury is presumed to disregard an instruction if the jury finds the evidence does not  
27 support its application”].) Here, the trial court instructed the jury that “[s]ome of  
28 the[ ] instructions may not apply, depending upon your findings of the facts of the  
case. Do not assume just because I give a particular instruction that I am  
suggesting anything about the facts. After you have decided what the facts are,  
follow the instructions that do apply to the facts as you find them.” (See CALCRIM  
No. 200.)

Although the prosecutor argued during closing statements that the facts showed  
LaGrone provoked the fight to create an opportunity to use force, the jury was able  
to view video footage of LaGrone’s interactions with the victims for itself, and  
defense counsel thoroughly detailed the evidence that LaGrone did not personally  
act to provoke a fight. Defense counsel argued that the prosecutor’s factual  
assertions that LaGrone went to the apartment because he had a knife and drew the  
victims out “are not supported by the evidence.” She played the video evidence  
and narrated LaGrone’s actions throughout, including the fact that “[h]e didn’t  
challenge people in the apartment. He didn’t say anything to them. He was trying  
to make very clear with his body language he was not there to engage them. [¶] . . .  
[H]is body language[ ] [was] showing he is not there to be in a confrontation. He is  
not there to fight.” Defense counsel noted that when Jermell took on a fighting  
stance, LaGrone put out his left hand to tell Jermell to stop, get back; she tells the

jury, “You can see it in the cell phone video and the surveillance video.” The court also reminded the jurors that they are the “triers of the facts.” The jury was able to view the videos and confirm defense counsel’s account, and there is no reason to think the jury would have disregarded the court’s instructions.

*LaGrone*, 2021 WL 4891295, at \*2-\*3.

Petitioner is not entitled to relief unless the giving of CALCRIM No. 3742 had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637. The Court has carefully reviewed the record and finds that the state court's determination that Petitioner was not prejudiced by the giving of CALCRIM No. 3742 was not contrary to, and did not involve an unreasonable application of, clearly established Federal law; and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Petitioner has not presented any evidence that the jury improperly applied CALCRIM No. 3742 and the record indicates that there was sufficient evidence from which a jury could find that the prosecution had proven beyond a reasonable doubt that Petitioner was not engaged in self-defense.

The jury was instructed that they were the ultimate arbiter of the facts and that whether a jury instruction was applicable depended on its findings about the facts of the case. RT 689-90.<sup>4</sup> The jury was also instructed that to prove Petitioner guilty of assault with a deadly weapon, the prosecution must prove beyond a reasonable doubt that Petitioner did not act in self-defense or defense of someone else, and that if the prosecution did not meet its burden of proof with respect to defense of another, the jury was required to acquit Petitioner of the charges. RT 705-06, 712. The jury was instructed that acting in the defense of others was defined as follows:

The defendant acted in . . . defense of another if the defendant reasonably believed that . . . another person was in imminent danger of being touched unlawfully;

The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

<sup>4</sup> “You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial . . . . Pay careful attention to all of these instructions and consider them together . . . . Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” RT 689-90.

1           The defendant used no more force than was reasonably necessary to defend  
against that danger. . . .

2           The defendant is only entitled to use that amount of force that a reasonable  
person would believe is necessary in the same situation. If the defendant used more  
3           force than was reasonable, the defendant did not act in lawful defense or defense of  
another.

4           When deciding whether the defendant's beliefs were reasonable, consider  
all of the circumstances as they were known to and appeared to the defendant, and  
5           consider what a reason[able] person in a similar situation with similar knowledge  
would have believed.

6           RT 711. There was sufficient evidence from which a jury could reasonably conclude that  
7           Petitioner did not act in defense of another in that Petitioner used more force than was reasonable.  
8           Petitioner's initial response to seeing Freddy hit was to use a knife, which he kept hidden from  
9           view, and stab Jermell in the face. Yet, up to that point, no weapons had been used and there was  
10           no indication that any of the participants or bystanders had weapons available to them. Petitioner  
11           had other options available to him, such as asking the parties to stop fighting, pulling Freddy  
12           away, warning D.J. and Jermell that he had a knife, or engaging in the fight with his fists.  
13           Petitioner's concern that he could not "win" the fistfight with fists alone did not necessarily render  
14           the use of a knife reasonable in this situation because a jury could conclude that was not  
15           reasonable to think that Petitioner could only protect Freddy by winning the fistfight. Petitioner's  
16           argument that he was prejudiced by CALCRIM No. 3742 because there was substantial evidence  
17           that he acted in defense of others relies on the incorrect assumption that the prosecution did not  
18           prove beyond a reasonable doubt that Petitioner had not acted in defense of others. As explained  
19           <sup>supra</sup>, there is sufficient evidence in the record from which a jury could conclude beyond a  
20           reasonable doubt that Petitioner had not acted in defense of Freddy because he used more force  
21           than was reasonable in the situation. Petitioner has not demonstrated that the giving of CALCRIM  
22           No. 3742 was error or that it caused him actual prejudice because, even if there was insufficient  
23           evidence that he provoked the fight, Petitioner has not demonstrated that the jury found  
24           CALCRIM No. 3742 applicable or that the prosecution failed to meet its burden of proof. Federal  
25           habeas relief is denied on this claim.

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United States District Court  
Northern District of California

**C. Certificate of Appealability**

The federal rules governing habeas cases brought by state prisoners require a district court that issues an order denying a habeas petition to either grant or deny therein a certificate of appealability. *See Rules Governing § 2254 Case, Rule 11(a).*

A judge shall grant a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the certificate must indicate which issues satisfy this standard. *Id.* § 2253(c)(3). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, Petitioner has not made such a showing, and, accordingly, a certificate of appealability will be denied.

## IV. CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a certificate of appealability is DENIED. The Clerk shall enter judgment in favor of Respondent and close the case.

## IT IS SO ORDERED.

Dated: July 31, 2023

  
JON S. TIGAR  
United States District Judge